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No.

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

MANHATTAN EYE, EAR & THROAT HOSPITAL,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of Respondent, Local 1199, Drug, Hospital and Health Care Employees Union, RWDSU, AFL-CIO, In Opposition to Petition for Certiorari

BASIL A. PATERSON
MEYER, SUOZZI, ENGLISH
& KLEIN, P.C.
1505 Kellum Place
Mineola, New York 11501
(516) 741-6565
Counsel for the Respondent, Local 1199, Drug, Hospital And Health Care Employees Union, RWDSU, AFL-CIO

Of Counsel:

HAROLD ICKES
JEFFREY G. STARK
RANDOLPH M. SCOTT-MCLAUGHLIN

Counter Statement of Questions Presented for review.

1. Whether substantial evidence in the record as a whole supports the National Labor Relations Board's finding that the petitioner violated Section 8(a)(1) of the Act by soliciting employees to resign from the respondent Union?

2. Whether the National Labor Relations Board abused its discretion in finding that the petitioner's unfair labor practices tended to undermine the respondent Union's majority status and that a bargaining order was an appropriate remedy in light of the petitioner's failure to affirmatively show that its conduct did not affect the loss of Union support?

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NATIONAL LABOR RELATIONS BOARD and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF OF RESPONDENT, LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO, IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

In this proceeding, the Manhattan, Eye, Ear and Throat Hospital ("Hospital") seeks review of the Second Circuit's enforcement of an order of the National Labor Relations Board ("Board") requiring the Hospital to cease and desist from unfair labor practices and to bargain with Local 1199, Drug, Hospital And Health Care Employees Union, RWDSU, AFL-CIO ("Union").

The Board's order was based on its finding that the Hospital committed an unfair labor practice when it solicited resignations of registered nurses from the Union and conditioned the return of the nurses to their jobs on their resignation from the Union. The Board found that the Hospital created an atmosphere wherein employees would tend to feel imperiled in maintaining their Union membership and that the Hospital's conduct clearly tended to interfere with the employees' free exercise of their rights

under the National Labor Relations Act ("Act").

The Board also found that the Hospital's withdrawal of recognition from the Union violated Section 8(a)(5) of the Act (29 U.S.C. §158 (a)(5)). The Board rejected the Hospital's asserted good faith doubt of the Union's continued majority status on the grounds that the Hospital had not met its burden of showing that its doubt arose in an atmosphere free from interference aimed at causing disaffection from the Union.

In its order granting the Board's application for enforcement, the Second Circuit found that "there is substantial evidence on the record to support [the Board's] determination." A132.*

The Second Circuit's enforcement of the order is not in conflict with other

* References preceded by "A" are to pages in petitioner's appendix submitted with the petition for a writ of certiorari.

circuits as the rule in withdrawal of recognition cases is that if an employer engages in conduct which is aimed at causing disaffection from the union, and which tends to have that effect, the employer must affirmatively show that its unlawful conduct was of a technical nature or did not cause the union to lose majority support.

In the case at bar, the Hospital failed to carry its burden, the Board so found, and the Second Circuit properly upheld the Board's determination.

A. The Board's finding of facts.

1. Background

Since 1980, the Union represented a unit of approximately 101 registered nurses at the Hospital. On June 13, 1984*, the

* Unless otherwise indicated, all dates are 1984.

parties' most recent collective bargaining agreement expired, and the Union commenced an economic strike on July 13. A112. On July 18, nurse Adjari filed a petition seeking to decertify the Union. The decertification election was scheduled for August 30.

2. Supervisor James solicits employees to resign from the Union.

On July 23, approximately one week after the strike began, supervisor James, who was campaigning for office in the Phillipine Nurses Association, telephoned nurse Soriano and indicated that she was calling, on behalf of Director of Nursing Herbert and Director of Education Rudan, to ask the Filipino nurses to return to work. A35, A114. Soriano testified that James said,

> "[b]efore I could go back to work, I have to write to Joann Marshall* resigning from District 1199 and then I can join the New York State Nurses Association." A114-15.

---

* Marshall was an official of the Union.

On July 26, James spoke with nurse Young. According to Young, James phoned her at home and said that

> "a lot of nurses had signed a petition that they were resigning from the union because the union is not assisting any more and it's not a professional union." A115.

Young also testified that James told her to

> "write to Joann Marshall if I wanted to resign also from the Union...[and] send it by certified mail." A115.

One week later, James phoned Young again and told her that

> "almost all the nurses are resigning already...that they were coming back to work and if you want to be interested to come back, you can come back any time...but you have to resign first from the union before you can come back to work." A115-16.

On July 27, James telephoned nurse Merka at her home and stated that she "had been asked by [Director of Education] Rudan to call the Filipino nurses to return to work." A116.

Approximately one week later, James again called Merka and remarked, "you're

still not back to work," and told Merka to "write to Ms. Joann Marshall." Merka testified that James stated:

> "[I]f I need some help to write, she could help me to write the letter, that I will no longer be a member of 1199." A116.

On August 19, nurse Valentini called the nursing office and asked about the strike situation. A124. Valentini testified that James told her that

> "if you wish to come back to work, you have to resign from the union." A123. n.7.

Toward the end of the strike, nurse Simmons called the Hospital to find out the procedure for returning to work. Simmons spoke with James, who told her that

> "I should write a letter to Joann Marshall...that I resign from 1199 and send it certified letter." A116-17.

Simmons further testified that the format of the letter of resignation was dictated to her by James. A117.

James testified that during July Director of Education Rudan asked her to inquire of the Hospital's striking nurses whether they were planning to return to work and to report back to him. James testified that in the course of her campaign for office in the Philippine Nurses Association, she made hundreds of telephone calls from her home to nurses throughout the city. In the course of making these telephone calls, James spoke to approximately 15 to 20 of the Hospital's Filipino nurses, but was unable to say precisely how many. A47. She denied telling anyone to resign from the Union or not to return to work unless they quit the Union. A48.

The Administrative Law Judge did not find James' testimony credible and held:

> "A review of her testimony and that of the...nurses who testified to their conversations with her leaves no doubt that she called and made inquiries respecting their intentions with respect to the strike at the behest of

> Respondent's management; made references to resignation from the Union and in at least some instances associated resignation with their return to work; made follow-up telehone calls to ascertain what they intended to do; and began some of the conversations with the flat statement that she was calling them back to work." A53-54.*

Despite this finding, the Administrative Law Judge dismissed the complaint on the ground, inter alia, that James' conduct did not constitute coercion under Section 8(a)(1) of the Act. A67.

3. The decertification election is postponed; the Hospital withdraws recognition.

The decertification election scheduled for August 30 was postponed because of the filing of unfair labor charges by the Union. A113.

Subsequent to the postponement of the election, nurse Adjari gathered cards from 51 nurses which indicated that they no longer wished to be represented by the Union.

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* The Board adopted the Administrative Law Judge's credibility findings. A110, n.1, A117-18, A120, n.6.

A113. The unit represented by the Union consisted of 101 nurses. A112. Thus only enough cards were obtained to represent a bare majority of one. On September 6, Adjari presented the cards to Director of Nursing Herbert. On September 7, the Hospital notified the Union that it was withdrawing recognition based on the following factors: a majority of nurses had crossed the picket line and returned to work; the Hospital's belief that many, if not all, nurses who did so had resigned from the Union; a petition signed by a majority of the registered nurses requesting the Hospital to withdraw recognition. A113.

Subsequent to the withdrawal of recognition, on or about September 12, the Hospital put into effect a wage increase and new pension, health and insurance plans and in October instituted a new grievance procedure. A114.

4. The Board's decision and order.

Based on the foregoing facts, the Board determined that the Hospital violated Section 8(a)(1) of the Act:

> "Contrary to the judge, we find that James' conversations with the employees went beyond the mere providing of information and constituted unlawful solicitation of resignation from the Union....[I]t is clear from the testimony here that James solicited resignations from the Union and conditioned return to work on resignation from the Union....James evidenced a continuing interest in knowing whether or not the nurses intended to resign and return to work and in some instances offered assistance. James explicitly stated that she was calling on behalf of her superiors. James thereby created a situation wherein employees would tend to feel imperiled in maintaining their membership. Erickson's Sentry of Bend, 273 NLRB No. 11 (1984). In so doing, James' conduct, aimed at causing disaffection from the Union, clearly tended to interfere with the employees' free exercise of Section 7 rights and was unlawful interference...regardless of whether there is evidence that James actually achieved a coercive affect. Amason, Inc., 269 NLRB 750 fn.2 (1984) enfd. mem. 758 F.2d 648 (4th Cir. 1985)." A121-23 (emphasis supplied).

The Board also concluded that the Hospital failed to demonstrate that its

asserted objective considerations for withdrawing recognition arose in an atmosphere free of coercion. A123,n.7. Thus, having found that the Hospital engaged in unlawful conduct aimed at dissipating Union support, the Board determined that the Hospital's withdrawal of recognition and its unilateral changes in the terms and conditions of employment violated Sections 8(a)(5) and (1) of the Act. A124.

The Board issued an order requiring the Hospital to cease and desist from the unfair labor practices and from interfering with, restraining, or coercing employees, in any like or related matter, in the exercise of the rights guaranteed them under Section 7 of the Act (29 U.S.C. §157). Additionally, the Board ordered the Hospital, on request, to bargain with the Union and embody any understanding reached in a signed agreement; to restore, on request, the terms and conditions of employment in existence prior to its unlawful unilateral changes; to make

the employees whole for any losses incurred by reason of those changes; and to post an appropriate remedial notice. A126-29.

On February 6, 1987, the Second Circuit granted the Board's application for enforcement of its order. A131-33. The court, in a summary order, found there was substantial evidence in the record to support the Board's determination. A132.

Summary of Argument

Point I below demonstrates that the applicable standard of review of a Board bargaining order is whether substantial evidence in the record as a whole supports the Board's factual determination. Equally important, where the Board finds an unfair labor practice, the courts give special respect to the Board's determination as to the effect of those practices and to the measures required to remedy such practices.

Point II below demonstrates that the Board's finding that the Hospital

committed an unfair labor practice by soliciting employees to resign from the Union is supported by substantial evidence. We show that the Board correctly found that the Hospital's conduct was coercive and interfered with the employee's free exercise of Section 7 rights, and thus, the Hospital's actions in soliciting Union resignations were neither pure speech nor an expression of an opinion protected by Section 8(c) (29 U.S.C. §158(c)) of the Act.

Point III below demonstrates that the Board was permitted to draw an inference that the Hospital's unlawful conduct tended to undermine the Union's majority strength. Consequently, it was incumbent upon the Hospital to affirmatively demonstrate that its actions did not, in fact, have such effect. Since the Hospital offered no such proof, the Board properly entered a bargaining order.

P O I N T I

The standard of review.

In reviewing orders of the Board, the courts are guided by certain well-established standards.

First, it is well-settled that the Board's findings of fact are conclusive if supported by substantial evidence in the record as a whole. When the Board's findings are supported by substantial evidence, the reviewing court

> "may [not] displace the Board's choice...even though the court would justifiably have made a different choice had the matter been before it de novo."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

Second, where an unfair labor practice has been found, the courts will defer to the Board, particularly where the record is silent, as to "the actual impact of the employer's unfair labor practices." Arbie Mineral Feed Co. v. NLRB, 438 F.2d 940, 945 (8th Cir. 1971).

Third, as the Court held in NLRB v. Gissel Packing Co., 395 U.S. 575, 612, n.32 (1969), the Board's choice of remedy in unfair labor practice cases must be given special respect by reviewing courts. As the Court there held, the appropriate remedy for unfair labor practices affecting the union's majority status is for the Board to determine

> "based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of [the Act] the Board draws on a fund of knowledge and experience all its own and its choice of remedy must therefore be given special respect by reviewing courts."

Accord International Association of Machinists v. NLRB, 311 U.S. 72, 82 (1940) ("It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged."). See also Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

P O I N T I I

Substantial evidence in the record as a whole supports the Board's finding that the Hospital violated Section 8(a)(1) of the Act by soliciting employees to resign from the Union.

It is well-settled that an "[e]mployer's activities which are calculated to erode employee support for the union violate Section 8(a)(1)." NLRB v. Triumph Curing Center, 571 F.2d 462, 470 (9th Cir. 1978); accord NLRB v. Deutsch Co., 445 F.2d 902 (9th Cir. 1971), cert. denied, 405 U.S. 988 (1972).

The courts have consistently held that "[i]t is unlawful under Section 8(a)(1) 'for an employer...to induce employees to sign any form of a union repudiating document.'" NLRB v. Triumph Curing Center, supra, 571 F.2d at 470; NLRB v. Birmingham Publishing Co., 262 F.2d 2, 7 (5th Cir. 1958). Accord NLRB v. Proler International Corp., 635 F.2d 351, 354 (5th Cir. 1981). See also NLRB v. S & H Grossinger's, Inc., 372

F.2d 26 (2d Cir. 1967); Texaco, Inc. v. NLRB, 722 F.2d 1226 (5th Cir. 1984).

In NLRB v. Triumph Curing Center, supra, the Ninth Circuit enforced a Board order finding a violation of Section 8(a)(1) under circumstances which directly parallel those of the instant case:

> "Ford [a low level supervisor] called a striking employee, Mei Yuk Wan and asked her if she wanted to return to work. Wan replied affirmatively. The next day Ford told her she would have to withdraw from the Union to return to work. Ford explained to Michael Wan, Mei Yuk's son, how his mother must send a registered letter of withdrawal to the Union."

Id. at 469. The court held that those conversations and other "similar treatment" encountered by two other employees "represent the type of promises of economic benefit and employer assistance to secure union repudiation which are prohibited by the Act." Id. at 470-71.

Similarly, the Board held in Sedloff Publications, Inc, 265 N.L.R.B. 962

(1982), that an employer violated Section 8(a)(1) when it conditioned the return to work of striking employees upon their withdrawal from the union.

In the case at bar, the Board similarly found the Hospital had solicited union resignation. The Board based its findings on the following acts of James: (1) she solicited resignations from the Union (A122); (2) she conditioned return to work by striking employees on resignation from the Union (id.); (3) she offered to assist employees to write a letter of resignation from the Union (id.); (4) she provided specific wording to be used in the letter of resignation (A117); (5) she instructed employees as to the Union officers to whom letters of resignation should be sent (A114); (6) she evidenced a continuing interest in knowing whether or not the nurses intended to resign and return to work (A122); (7) she told employees that she was calling on behalf

of management (A122); (8) she created a coercive environment wherein employees would feel imperiled in maintaining their Union membership. Id.

On these facts, the Board found that the Hospital engaged in conduct aimed at causing disaffection from the Union and that such conduct tended to interfere with the employees' free exercise of Section 7 rights. A122-23.

On the record before it, the Second Circuit properly concluded that the Board's determination was supported by substantial evidence.

The Hospital contends, in its petition (P29)*, that in order to sustain an unfair labor practice charge in the instant case, the Board must find that the statements made by James constitute a threat or coercion

* References preceded by "P" are to pages in the Hospital's petition for a writ of certiorari.

But Section 8(a)(1) of the Act makes it unlawful for "an employer to interfere with, restrain or coerce employees in the exercise of ... Section 7 rights." In Texaco, Inc. v. NLRB, 722 F.2d 1226, 1233 (5th Cir. 1984), the court held that

> "[i]t is not necessary for an employer to threaten, coerce, or promise benefits to the employees for its conduct to violate §8(a)(1). 'Interference'in the terms of the statute is enough."

In the present case, the Board, affirmed by the Second Circuit, found that James' conduct, aimed at causing disaffection from the Union,

> "clearly tended to interfere with the employees' free exercise of Section 7 rights and was unlawful interference." A122-23.

This finding was consistent with the findings of other circuits in the face of similar activity. NLRB v. Triumph Curing Center, 571 F.2d 462 (9th Cir. 1978); Texaco, Inc. v. NLRB, 722 F.2d 1226 (5th Cir. 1984). Because

the Hospital's conduct constituted unlawful interference, it was not "pure speech" as claimed by the Hospital and neither protected by the First Amendment nor by Section 8(c) of the Act.* See NLRB v. Gissel Packing Co., 395 U.S. 575, 616-619 (1969).

P O I N T I I I

The Board did not abuse its discretion in finding that the Hospital's unfair labor practices tended to undermine the Union's majority status and that a bargaining order was an appropriate remedy in light of the Hospital's failure to affirmatively show that its conduct did not affect the loss of Union support.

In the case at bar, the Board found that the Hospital violated Section 8(a)(1) of the Act by soliciting resignations from the

* It should be noted that the Hospital's contention that its conduct was protected by Section 8(c) and the First Amendment was rejected by the Administrative Law Judge (A69, n.4), but the Hospital did not raise this claim before the Board by way of exception, or in opposition to the exceptions of the General Counsel or the Union. Thus, this issue is not properly before the Court. See Woelke & Romero Framing Co. v. NLRB, 456
[footnote continued on next page]

Union, conditioning the return to work of nurses on their resignations from the Union and offering assistance to nurses in drafting letters of resignation, and that the Hospital thereby created an atmosphere wherein the nurses would feel imperiled in maintaining their union membership. A122. Given the nature of these unfair labor practices, the Board was permitted to draw an inference that they tended to undermine the majority strength of the Union. Arbie Mineral Feed Co. v. NLRB, 438 F.2d 940, 945 (8th Cir. 1971). See also National Cash Register v. NLRB, 494 F.2d 189, 195 (8th Cir. 1974); NLRB v. Noll Motors, Inc., 433 F.2d 853 (8th Cir. 1970), cert. denied, 402 U.S. 906 (1971).

Since such an inference was appropriate in light of the Hospital's

[footnote continued from previous page] U.S. 645, 665-666 (1982); Detroit Edison Co. v. NLRB, 440 U.S. 301, 311-312, n.10 (1979); Garment Workers v. Quality Manufacturing Co., 420 U.S. 276, 281, n.3 (1975). We believe that the Board will more fully address this point in its brief.

violations of the Act, the Hospital was required to produce evidence affirmatively showing that its conduct did not, in fact, contribute to the Union's loss of majority support. Pittsburgh and New England Trucking Co. v. NLRB, 643 F.2d 175, 177 (4th Cir. 1981) ("An employer may avoid a bargaining order by showing that... [its] unfair labor practices did not significantly contribute to ...a loss of majority...."). Accord NLRB v. NuSouthern Dyeing and Finishing, Inc., 444 F.2d 11, 16 (4th Cir. 1971). See also National Cash Register Co. v. NLRB, 494 F.2d 189, 195 (8th Cir. 1974) ("The existence of an unfair labor practice prior to the refusal to bargain interjects an element of uncertainty about whether the employer thus caused the possible loss of majority. But if it is shown the unfair labor practice did not significantly contribute to the loss of status, the employer may avoid a bargaining order.").

These cases are relied on by the Hospital in the petition (P25) in support of its argument that the Board failed to find a nexus between the Hospital's unfair labor practice and its withdrawal of recognition from the Union. These cases stand, however, for the proposition that where an employer commits one or more unfair labor practices which tend to undermine union support, the employer has an affirmative duty to demonstrate that its unlawful conduct did not, in fact, contribute to the loss of such support. Here, the Board explicitly found that the Hospital's conduct "clearly tended to interfere with the employees' free exercise of Section 7 rights...." (A122-23) and that the Hospital failed to satisfy its "burden of establishing that...[the loss of union support] arose in an atmosphere free of coercion...." A123, n.7.

In the instant case, the Hospital failed to produce any evidence that its conduct did not significantly contribute to

the loss of the Union's majority status. In fact, the Hospital did not produce any of the 51 nurses who signed cards indicating disaffection from the Union to testify that they were not the subject of the same type of phone calls from James as were the five nurses who testified and that they were not induced to reject the Union by the Hospital's unlawful conduct. See Pittsburgh and New England Trucking Co. v. NLRB, 643 F.2d 175, 178 (4th Cir. 1981) (holding that the employer was improperly barred from calling a witness to testify that she and other union members who signed a petition for termination of representation were not affected by the employer's unfair labor practices).

The case at bar is distinguishable from Daisy's Original, Inc. v. NLRB, 468 F.2d 493 (5th Cir. 1972), relied on by the Hospital (P22,23,28) wherein the court held that a bargaining order was not warranted where the unfair labor practices were merely

technical violations of the Act which did not tend to dissipate the Union's majority and did not prevent a fair decertification election. Here, the unfair labor practices were serious, were directly aimed at causing disaffection from the Union and tended to have that effect. Compare NLRB v. Carilli, 648 F.2d 1206, 1217 (9th Cir. 1981) (Daisy's Original, Inc. was distinguished on the ground that violations there "were merely technical violations of the Act which did not dissipate the Union's majority...[whereas here] the unfair labor practices were more numerous and more serious...."). See also Hotel, Motel and Restaurant Employees v. NLRB, 785 F.2d 796, 800 (9th Cir. 1986), cited by the Hospital (P25), where the court affirmed the Board's finding that the unfair labor practice of the employer, namely denial of union access to the kitchen areas of the restaurant, was "not of such a character as to either affect the Union's status, cause

employee disaffection, or improperly affect the bargaining relationship itself."

The case of Peoples Gas Systems, Inc. v. NLRB , 629 F.2d 35 (D.C. Cir. 1980), relied on by the Hospital (P28) is also distinguishable on its facts. The circuit court stated those facts as follows:

> "The inititial refusal to bargain occurred seven years ago, in a context that suggests the company was proceeding in good faith, though in violation of the law. We have no way of knowing in fact whether the employees were in favor of the union at that point, though we recognize the presumption that they were. Two years later, the union requested an election, which was conducted in an atmosphere free from coercive unfair labor practices and lost decisively. Five more years have passed since then, during which inevitable employee turnover has occurred. If any of these facts were altered, we would be more willing to defer to the Board....If the Company's violation appeared to be in bad faith, or were accompanied by other unfair labor practices, the deterrent effect of a bargaining order would be more important. ... Given the facts of this case,...we must conclude that a bargaining order would be an unreasonable and unwise remedy...."

Id. at 50 (emphasis in original).

Among other distinguishable features, Peoples Gas involved a decisive union loss in a fair election. The case at bar involves an employer's claim of a one card majority.

The Board did not abuse its discretion in determining the remedy for the Hospital's unlawful conduct, its findings of fact are supported by substantial evidence in the record as a whole and there is no conflict between the Second Circuit's enforcement of the Board's order and the decision of other circuits.

C O N C L U S I O N

The petition for a writ of certiorari should be denied in all respects.

Dated: Mineola, New York
June 1, 1987

Respectfully submitted,

BASIL A. PATERSON
Counsel for Respondent,
Local 1199, Drug, Hospital
And Health Care Employees
Union, RWDSU, AFL-CIO

MEYER, SUOZZI, ENGLISH
& KLEIN, P.C.
1505 Kellum Place
Mineola, New York 11501
(516)741-6565

Of Counsel

HAROLD ICKES
JEFFREY G. STARK
RANDOLPH M. SCOTT-MCLAUGHLIN